



Commonwealth of Kentucky  
Finance and Administration Cabinet  
**OFFICE OF THE SECRETARY**  
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**Steven L. Beshear**  
Governor

**Jonathan Miller**  
Secretary

November 30, 2010

**No. 10-32**

Dusty Smith, C.P.M.  
JEM Engineering & Manufacturing Co., Inc.  
908 West 41<sup>st</sup> Street  
Tulsa, OK 74107

RE: Determination of Protest: RFB 605 1100000196 (Steel Strain Poles).

Dear Mr. Smith:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of JEM Engineering & Manufacturing Co., Inc. ("JEM") relating to RFB 605 1100000196 for Steel Strain Poles. For the reasons stated herein, this protest is denied.

### **FACTUAL BACKGROUND**

The Kentucky Transportation Cabinet, Division of Purchases ("KYTC") issued the RFB on September 17, 2010. The RFB closed on September 24, 2010. KYTC made a written Determination and Finding which scored Path Master, Inc. ("Path Master") with the highest number of best value points. Graybar was scored with the second highest best value points. JEM was scored the fourth highest of the seven bidders. On September 30, 2010, KYTC awarded Path Master the contract.

By letter dated October 15, 2010 (and filed October 18, 2010), JEM protested the solicitation and/or award. JEM asserts that the design specifications were subjective and/or unclear. On October 27<sup>th</sup>, Pelco Structural, LLC submitted a response on behalf of its distributor and contract awardee, Path Master. On November 10<sup>th</sup>, KYTC submitted a written response.

## DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest and responses thereto, and other relevant information, the Secretary of the Finance Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. JEM submitted a bid in response to the RFB. JEM, therefore, has standing to protest.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here the RFB was issued on September 17<sup>th</sup>. The award was made on September 30, 2010. JEM filed its protest on October 18, 2010.

In its protest, JEM states it protests the solicitation and award. However, a review of the protest reveals that JEM is protesting the terms of the solicitation and not the award of the RFB.

A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. *See* 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD ¶ 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions.")

The Secretary finds that JEM'S protest should be denied on two principle grounds. First, the protest was submitted untimely. Secondly, JEM has waived its protest to the terms of the RFB by submitting a bid to the RFB.

Further, to the extent the protest was directed at the award, agency decisions are entitled to a presumption of correctness. KRS 45A.280. The protestor, therefore, has the burden to show that (1) the determination of responsiveness or the application of "best value" criteria was contrary to law or (2) the waiver of minor irregularities or the determination of responsibility was arbitrary or capricious, that is, irrational. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

In this case, the Secretary finds that JEM has not shown that the award was arbitrary, capricious, or contrary to law. Further, the Secretary finds that JEM has not shown that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract.

The Secretary finds that the protest is untimely, has been waived, has not demonstrated error, nor has established prejudice. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

A handwritten signature in dark ink, appearing to read 'Jonathan Miller', is written over a horizontal line.

Jonathan Miller  
Secretary, Finance and Administration Cabinet

cc: Peggy Stratton, KYTC  
Phil B. Albert, Pelco Structural LLC